CASE NO: 91-213

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

Winston B. McCall, Jr.,

PETITIONER,

v.

City of Birmingham, Alabama;
Arthur Deutcsh, in his official capacity
as Chief of Police of the
Birmingham Police Department,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Winston B. McCall, Jr.
708 Frank Nelson Bldg
Birmingham, Alabama 35203
(205) 322-8484
PRO SE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

SUPREME COURT DECISIONS

CIRCUIT COURT DECISIONS

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

Winston B. McCall, Jr.,

PETITIONER,

v.

City of Birmingham, Alabama:
Arthur Deutcsh, in his official capacity
as Chief of Police of the
Birmingham Police Department

RESPONDENTS.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Winston B. McCall, Jr.,(hereinafter referred to as "McCall"), pursuant to Rule 15.6 of the Supreme Court Rules files this brief in reply to Respondents' brief in opposition to McCall's Petition for a Writ of Certiorari. The Respondents, City of Birmingham, Alabama, and Arthur Deutcsh, in his official capacity as Chief of Police of the Birmingham Police

Department, are hereinafter referred to collectively as "Birmingham".

ARGUMENT

1. Birmingham, in its brief on pages 6, 7, and 10, made blatantly false assertions that the Birmingham ordinances do not regulate speech and are not content-based. A reference to the terms and context of each of the ordinances proves such an assertion to be linguistic blindness. Also, not only have the ordinances been previously applied to pure speech, as described by McCall in his complaint and affidavit, but Birmingham's assertion that the ordinances regulate conduct and not speech contradicts Birmingham's previous interpretation of those ordinances, as found on page 14 of Birmingham's brief filed in the Eleventh Circuit, where Birmingham stated:

> " The expressive conduct that the ordinance seeks to regulate is abusive or obscene language or obscene gestures but only if made with the intent to harass, annoy, or alarm another person.

. . .

"However, it is possible to view this ordinance as susceptible to an overbreadth challenge if harassment, as the ordinance defines it, is not seen as harmful, constitutionally protected conduct."(emphasis added)

The operative facts in this case involve only acts of pure speech by McCall and two ordinances which not only regulate only speech, but have a history, as evidenced in the record, of regulating the exact same speech that McCall will engage in.

2. Birmingham, in its "Statement of the Case", for the first time during the appeal process, disputed matters which Birmingham was deemed to have admitted through Birmingham's silence on appeal to the Eleventh Circuit. At all times, while this case was pending on appeal to the Eleventh Circuit, McCall contended that the District Court entered its order pursuant to Birmingham's motion to dismiss. Birmingham

never disputed that statement at any time, and since the District Court "dismissed" McCall's action rather than granting a summary judgment, such procedural fact should be considered as admitted by Birmingham for purposes of this review.

In accordance with the authorities previously cited, if the District Court's order is deemed to be based on Birmingham's alternative motion to dismiss, the allegations in McCall's complaint and as supplemented by McCall's affidavit are to be taken as true and all reasonable inferences that may be drawn therefrom in favor of McCall should be deemed to exist. Such facts and favorable inferences provide formidable basis for McCall's standing and for a reversal of the Circuit Court's judgement.

3. Even assuming the truth of Birmingham's contention that the District Court's ruling was on Birmingham's motion for summary judgment, Birmingham still would

not be entitled to a summary judgment on the issue of McCall's standing. Birmingham's contention that there is no evidentiary support for McCall's assertion of the existence of a requisite threat of prosecution of McCall, does not conform to the operative facts and inferences. For purposes of this review, the operative facts, as set out in McCall's statement of facts and the operable inferences drawn therefrom ably provide the near necessary conclusion (as advocated in McCall's complaint) that "Birmingham will enforce the two ordinances and will arrest and prosecute McCall under the Harassment and Public Intoxication Ordinance for his intended speech. The District Court, by dismissing McCall's complaint pursuant to Birmingham's motion, and the Eleventh Circuit, by endorsing the District Court's order, and not considering the operative facts favorable to McCall, violated the near

axiomatic legal standard for determining the merits of a summary judgment motion. That standard was expressed by this Court in Anderson vs. Liberty Lobby Inc., 477 US 242, 91 L Ed 202, 106 S Ct 2505 (1986), where this Court held, at 91 L Ed 2d 202, 216, that:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgement or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiably inferences are to be drawn therefrom.

and at 91 L Ed 2d 202, 212, that:

> "... it is clear enough that at the summary judgement stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."

See also: United States vs. Diebold, 369 US 654, 8 L Ed 176, 82 S Ct 993 (1962), which relates to the available inferences favoring the non-movant that must be considered by a

District Court in ruling on a motion for summary judgement. It is evident that the Circuit Court, through endorsement of the District Court's opinion, violated such standard by performing the function of a fact-finder and by weighing the competing inferences in favor of Birmingham, the moving party, rather than in favor of McCall, the non-moving party. It follows, that the District Court's ruling was erroneously based entirely upon the non-existent operative fact that a creditable threat of prosecution of McCall did not exist. Since the applicable operative fact, for purposes of Birmingham's motion, was that a threat of prosecution clearly existed, the Circuit Court's judgement was in error.

A brief review of some of the operative facts, not contested by Birmingham, that would, in themselves, provide the reasonable inference that a credible threat of

prosecution exists, are that: the two Birmingham ordinances exist, and have been and are continuing to be enforced; there have been previous, prior arrests under the Birmingham ordinances for the exact same speech that McCall will engage, to the exact same police officers; McCall has knowledge of the prior arrests under the ordinances for the same speech; McCall will engage in the same speech to the same police officers, as the friend previously arrested under the ordinances engaged in; McCall's friend's speech to such officers was the factual basis for the previous arrests under the Birmingham ordinances; the ordinances' proscriptions apply to McCall's speech since it is the same speech spoken to the same police officers, which provided the basis for the previous arrests of McCall's friend.

4. Birmingham, in its brief, failed to provide any argument challenging McCall's contentions that the enumerated decisions

cited by McCall in his petition established compelling authority warranting this Court's review of the Eleventh Circuit's decision.

Although commenting on other Circuit Courts' decisions, Birmingham never addressed McCall's argument that the substantial similarity between the facts and applicable law in the decisions cited by McCall, when compared to the facts and applicable law in this case, provide sound analogically reasoning that this Court should review the Eleventh Circuit's decision.

Because Birmingham's argument primarily consisted of conclusions lacking articulated reasoning, it is a logical impossibility for McCall to rebut most of such conclusions, since only the evidence and the reasons supporting Birmingham's conclusions, and not the conclusions themselves, can be argued.

5. Contrary to Birmingham's assertion, and even if the Hardwick vs. Bowers, 760 F

2d 1202 (1985) case is the only controlling precedent, the Circuit Court fallaciously compared the circumstances of McCall's claims to those of Does' claims in the Hardwick case, and not to those of Mr. Hardwick, which have much more similarity.

6. Although Birmingham acknowledged and referred to the liberal application of the standing rule in free speech cases, Birmingham never presented any argument to refute McCall's argument that he is entitled to standing under that theory. The ordinances regulate only speech, McCall will engage in only speech, and McCall seeks, among other remedies, to have the ordinances declared unconstitutional on their face, inter alia. Birmingham never attempted to distinguish even one of the numerous decisions of this Court cited by McCall in support of his claim that he is entitled to standing under the liberal standing rules.

7. Since McCall's challenge is only to those "specific provisions" of the Birmingham ordinances "which have provided the basis for actual arrests for the same speech" the fact of McCall's standing is clearly established. See: Steffel vs. Thompson, 415 US 452, 39 L Ed 2d 505, 541, 94 S Ct 1209 (1974).

8. Contrary to Birmingham's contention, the very existence of the Birmingham ordinances regulating the speech described therein, overwhelmingly warrants the conclusion that each ordinance will be enforced and applied under facts in this case and that McCall has reason to fear arrest and prosecution. Even if no prior arrests of any person had been made under the Birmingham ordinances, McCall would still have standing. This Court's decision in Babbitt vs. United Farm Workers National Union, 442 US 289, 60 L Ed 2d 895, 99 S Ct 2301 (1979), at 60 L Ed 2d 895, 909, appears

to firmly support the conclusion that the mere existence of the Birmingham ordinances that regulate speech would be enough, in themselves, to provide the existence of the requisite threat of prosection to support McCall's standing. Also since Birmingham "has not disavowed any intention of invoking the criminal penalty" under each of the ordinances, McCall "is not without some reason in fearing prosecution" for a violation of the ordinances. See: Babbitt, supra, at 60 L Ed 2d 895, 909. It would appear axiomatic that Birmingham will enforce its own ordinances otherwise the ordinances would have no deterrent effect and would thereby be ineffective in regulating conduct.

9. Birmingham in its argument, as did District Court in its opinion, dogmatically asserted that McCall is claiming protection of the rights of a third party (his friend), as distinguished from McCall's own

constitutional rights. Birmingham's assertion that various circumstances are an "unmistakable signal of a effort [by McCall] to assert rights of third parties" and that McCall is "doing nothing more than asserting a claim that, ..., his friend could not or would not bring." is unfounded. McCall's complaint and affidavit unequivocally show that McCall is seeking to protect his own constitutional rights and not those of some third party. It is McCall that seeks to and will engage in speaking; it is McCall who will be arrested; and it is McCall who will suffer the loss of his constitutional rights of freedom of speech. Rhetorically speaking, if McCall is not the appropriate party to bring this action seeking to protect his constitutional rights, what person or party would be more appropriate to bring this action.

10. Birmingham's argument with respect to prudential considerations has no

application. No circumstances exist such that any prudential standards should be considered by this Court. The thrust of McCall's claims is the protection of his constitutional rights.

11. Birmingham assertion that McCall's claims are "dreamed up" is nonsense. McCall is the only person having personal knowledge of his mental state and that mental state, as articulated in McCall's complaint and his affidavit, is deemed, under the foregoing authority and upon a motion to dismiss or for summary judgement, to be true for purposes of any ruling on Birmingham's motion.

12. Birmingham, as did the Circuit and District Courts, overlooks the standing standard established by this Court in determine if the element of fear of prosecution is present. This Court's decision in Babbitt vs. United Farm Workers National Union, 442 US 289, 60 L Ed 2d 895,

99 S Ct 2301 (1979), is abiding authority that if McCall is subject to even "a remote possibility of prosecution" he is to be accorded standing. The operative facts and inferences in this case abundantly evidence far more than a mere remote possibility that McCall will be arrested and, in fact, show that there is substantial likelihood of McCall's arrest if he engages in the speech, as described in his complaint.

13. Birmingham seems to assert, as did the District Court, that McCall is not a member of any group or classification to which the Birmingham ordinances would apply. Such an argument can not be maintained in light of the fact that the ordinances, on their face and as they have been previously applied, regulate the speech of a group that would engage in McCall's intended speech. The Birmingham ordinances are of general application and apply to the entire group of

speakers in the City of Birmingham. Clearly McCall is a member of that group.

14. Birmingham fails to neutralize the Bickman v. Lashof, 620 F 2d 1238 (7th Cir., 1980), decision's conflict with the Eleventh Circuit's decision in this case. On comparison, although it was impossible for the Bickman doctor to engage in alleged constitutionally protected conduct that was regulated by the challenged statute, the Seventh Circuit confirmed the doctor's standing. On the other hand, McCall is not restricted, other than by the sanctions of the ordinances, in the exercise of his intended speech, yet, McCall, under the Eleventh Circuit's decision is not entitled to standing. What more is necessary to establish a clear, unquestionable conflict between the decisions of the Seventh and the Eleventh Circuits.

The same reasoning holds true for the decisions of the Eighth and Fifth Circuits

in United Food and Commercial Workers International Union vs. IBP, Inc, 857 F 2d 422, (8th Cir., 1988) and Kvue, Inc. vs. Moore, 709 F 2d 922 (5th Cir., 1983), respectively. Each of those decisions involve similar relevant facts and law to those in this case, yet the decisions by those two Circuits Courts directly conflict with the decision of the Eleventh Circuit in this case.

15. Birmingham's reference to this Court's decisions in Los Angeles v. Lyons, 461 US 95, 75 L Ed 2d 675, 103 S Ct. 1660 (1983) and in Whitmore vs. Arkansas, 495 US 149, 109 L Ed 2d 135, 110 S Ct 1717 (1990), are as irrelevant factually to this case as any decisions could analogically be. The Lyons case involved an issue of whether a plaintiff has standing to constitutionally attack a "chock-hold" statute, where the possibility of the plaintiff being the subject of an another "chock-hold" was so

remote as to be speculative. Any prospective application of the "chock-hold" statute was conditioned upon the occurrence of a sequence of events that were unlikely to occur and over which the Lyons plaintiff had no control. There is no such condition that must occur before McCall will engage in his intended speech.

The Whitmore case involved a plaintiff seeking to protect the constitutional rights of a third party by seeking to stop the execution of that third party, who desired to be executed. McCall clearly seeks relief for loss of only his constitutional rights and not those of a third party, as in that case.

16. Contrary to Birmingham's contentions, the importance of the issue of standing in this case, as expressly or impliedly reflected in the previously enumerated decisions of this Court in McCall's petition, provides the certiorari-

value for this Court to exercise its discretionary review.

The claims asserted in McCall's petition are of such constitutional significance that this Court should grant McCall's petition. A Federal Court's denial of a remedy, after a hearing on the merits, to protect a litigant's First Amendment rights to speak is far less constitutional destructive, than a Federal Court's total refusal to provide any forum for a merits hearing to determine if such rights exist. A denial of a Federal forum has a far more far-reaching and exhaustive "chilling affect" upon the exercise of Freedom of Speech than any state or municipal law that specifically regulating such speech.

Also, as argued in McCall's petition, the issues in this case are of such constitutional significance that if not reviewed immediately by this Court, the expression of "the will of the people" will

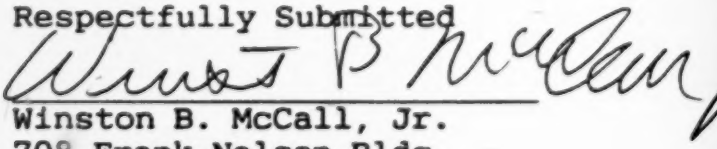
be mutated to such a extent that that constitutionally declared sovereignty will become the "will of public officials", and Abraham Lincoln's prophecy in his Gettysburg Address that our government "of the people, by the people, for the people, shall not perish from the earth" will be proved to be a hoax.

CONCLUSION

For the reasons stated above and previously in McCall's petition, it is respectfully requested that the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals be granted, and further that this Court summarily reverse that decision.

Dated: October 8, 1991

Respectfully Submitted



Winston B. McCall, Jr.
708 Frank Nelson Bldg.
Birmingham, AL 35203
(205) 322-8484
Petitioner (Pro Se)